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No. 07-481

In The
Supreme Court of the United States

RICKY MARTIN LLOYD WALTERS,

Petitioner,

v.

PETER D. KEISLER, Acting Attorney General of the United States; IMMIGRATION AND NATURALIZATION SERVICE; and JOHN BULGER, District Director, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Real ID Act abolished the writ of habeas corpus, where the habeas case was *not* "pending" in the District Court at the time of Real ID's enactment on May 11, 2005, but instead had been granted and was pending on appeal in the Circuit Court.

2. Whether the decision below impermissibly and unconstitutionally removes appellate review over completed habeas decisions of the United States District Courts, where the appeal of a grant of habeas relief was pending in the Circuit Court on the date of enactment of the Real ID Act.

3. Whether the decision below creates a Circuit split with other Circuits which have held that the Real ID Act does *not* apply to cases in which there is no final order of deportation, as in the present case.

4. Whether transferring Mr. Walters' petition to the Eleventh Circuit was contrary to this Court's precedents mandating the weighing of "traditional venue considerations" before venue may be transferred.

PARTIES TO THE PROCEEDING

The Petitioner is Mr. Ricky Martin Lloyd Walters, a national and citizen of the United Kingdom, who has lived in the United States for more than twenty (20) years but now faces removal. The Respondents currently are as follows: Acting Attorney General Peter D. Keisler; United States Immigration and Customs Enforcement, formerly the Immigration and Naturalization Service; and Michael Rozos, Regional Director, United States Immigration and Customs Enforcement, formerly John Bulger.

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PETITION FOR WRIT OF CERTIORARI

Ricky Martin Lloyd Walters, by and through his undersigned counsel of record, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Amended Order of the United States Court of Appeals for the Second Circuit (hereinafter "Second Circuit"), filed May 24, 2007, denying Mr. Walters' Petition for Panel Rehearing and Rehearing *En Banc* is not reported. Appendix ("App.") 41. The Order of the Second Circuit, filed May 11, 2007, which denied Mr. Walters' Petition for Panel Rehearing, but did not rule on his Petition for Rehearing *En Banc*, is not reported. App. 39. The Summary Order of the Second Circuit, filed September 20, 2006, vacating the judgment of the District Court, converting Mr. Walters' habeas petition into a petition for review, and transferring the case to the United States Court of Appeals for the Eleventh Circuit, is not reported. App. 1. The decision of the United States District Court for the Southern District of New York, filed November 3, 2003, is not reported. App. 7.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. § 1252, as amended by the Real ID Act of 2005, (hereinafter, the "Real ID Act"), Pub.L. No. 109-13, Div. B., 119 Stat. 231, 310-11 (enacted May 11, 2005), are provided. *See* App. 43-48. Section 106(a) of the Act eliminates the habeas jurisdiction of the District Courts to review claims challenging final removal orders and provides that petitions for review filed with Courts of Appeals shall be the exclusive means for challenging final removal orders by the Board of Immigration Appeals (BIA). App. 43-44. Section 106(b) generally provides that the Act applies retroactively. App. 46. Section 106(c) provides the procedure for handling cases pending in the District Court on the date of the Act's enactment, namely, that all habeas petitions "pending" in the District Court be transferred to the Court of Appeals as petitions for review. App. 47.

STATEMENT

This case presents an important question regarding the proper interpretation, scope, and application

of the Real ID Act of 2005. Here, the District Court had *granted* Mr. Walters' habeas petition. App. 7. The government then appealed that decision to the United States Court of Appeals for the Second Circuit. While the case was pending on appeal, Congress passed the Real ID Act. App. 43-48. The statute, however, does *not* provide under such circumstances for the divestiture of habeas review or for the conversion of such appeals into petitions for review of BIA decisions. The Second Circuit's decision impermissibly eliminated habeas review, is without any statutory basis, is contrary to Congress' intent in passing the Real ID Act, and is at odds with this Court's prior precedent decisions. App. 1; *see, e.g., INS v. St. Cyr,* 533 U.S. 289, 298-99 (2001); *Felker v. Turpin*, 518 U.S. 651, 652 (1996); *Ex Parte Yerger,* 75 U.S. (8 Wall.) 85, 105 (1868).

A. Factual Background

Petitioner, Ricky Martin Lloyd Walters, is a citizen of the United Kingdom who became a lawful permanent resident ("LPR") of the United States on April 16, 1976, as a young child. App. 8. He came to the United States at the age of eleven (11) and has no ties to the United Kingdom. *Id.* His mother and father, grandparents, sister, cousin, and nieces are all citizens of the United States or lawful permanent residents. He is married to a United States citizen and has two United States citizen children. Mr. Walters is a successful and nationally recognized "rap" artist who has released several albums, one of

which achieved "platinum" status (over one million copies sold), under the name "Slick Rick." Mr. Walters owns property in the United States, and still works as a music performer in the United States. Mr. Walters' contribution to society by positively influencing young African American children is well documented. The Board of Immigration Appeals (BIA) below found that his "nationally recognized musical career is evidence of his value to the community," as is his work since 1991 "with a youth community outreach program in which he advises young people about the music business and encourages them to avoid criminal activity." *See* Joint Appendix (JA), submitted to the Second Circuit, at 142-43.

On June 19, 1995, an Immigration Judge ("IJ") in New York City granted the Petitioner relief under Section 212(c) of the Immigration and Nationality Act, formerly codified at 8 U.S.C. § 1182(c) (hereinafter "INA § 212(c)"), restored his lawful permanent resident status, and terminated his deportation proceeding, notwithstanding his conviction for attempted murder in the second degree and firearms violations. App. 9-10. On November 7, 1995, the Board of Immigration Appeals dismissed the government's appeal, concluding that the grant of relief is "in the best interests of the country." App. 11.

On December 8, 1995, the government filed with the BIA a motion to reopen and reconsider its November 7, 1995 decision on the ground that Mr. Walters was ineligible for § 212(c) relief since he served more than five years in prison. App. 11. On

March 26, 1997, the BIA granted the government's motion, vacated its November 7, 1995 decision, and ordered Mr. Walters deported to the United Kingdom. App. 12. On April 25, 1997, Mr. Walters, *pro se*, filed with the Second Circuit a timely petition for review of the BIA's March 26, 1997 decision. App. 12. By summary order dated June 12, 1998, the Court of Appeals dismissed the petition for lack of jurisdiction, but noted that Mr. Walters may file a § 2241 habeas corpus petition to challenge the March 26, 1997 BIA order. *See* App. 12-13 (*Walters v. INS*, 159 F.3d 1349 (table), 1998 WL 537197 (2d Cir. June 12, 1998)).

On June 1, 2002, Mr. Walters was detained by immigration officials in Bradenton, Florida, as a result of his brief departure from the United States due to a musical engagement upon a cruise ship. App. 13. Mr. Walters was served with a Notice to Appear ("NTA"), charging him as an inadmissible alien for his post-deportation reentry and his prior criminal conviction. *Id.* On July 12, 2002, an IJ in Florida found Mr. Walters inadmissible on both grounds and ordered him removed to the United Kingdom. Mr. Walters appealed the IJ's decision to the BIA. *Id.*

While the BIA appeal was pending, Mr. Walters filed a § 2241 habeas corpus petition in the United States District Court for the Middle District of Florida. The District Court denied the petition on September 10, 2002, because there was no final order of removal. Shortly thereafter, the BIA summarily affirmed the IJ's decision on November 25, 2002. Mr. Walters filed a timely petition for review of the BIA's

decision with the Eleventh Circuit, which dismissed the petition for lack of jurisdiction on January 30, 2003. App. 13-14.

A habeas petition and a motion to stay deportation were filed in the United States District Court for the Southern District of New York on December 2, 2002. App. 14. The District Court granted the stay on December 27, 2002, and granted the petition on October 31, 2003. App. 29. The government timely appealed the District Court's decision to the Second Circuit. The Second Circuit declined to continue to treat the case as a habeas action. It converted the case to a petition for review and transferred the case to the United States Court of Appeals for the Eleventh Circuit. App. 4.

In its Summary Order dated September 20, 2006, the panel held that 8 U.S.C. § 1252(b)(2) is only a *venue* provision, not a jurisdictional provision, and that therefore the Court had the *discretion* to retain Mr. Walters' case as a petition for review. *Id.* It cited an earlier case, *Moreno-Bravo v. Gonzales*, 463 F.3d 253 (2d Cir. 2006), in which the Court of Appeals retained jurisdiction and issued a decision on the merits. The panel, however, then distinguished *Moreno-Bravo* and decided to transfer the instant case to the Eleventh Circuit, as a matter of discretion. *Id.* Mr. Walters filed a petition for panel rehearing and rehearing *en banc* on the grounds that a transfer of venue to the Eleventh Circuit was an error that would result in manifest injustice to Mr. Walters, and evidenced a failure to apply the "traditional venue

considerations" required under binding Supreme Court precedent. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 451-52, 124 S.Ct. 2711, 2728 (2004). The Second Circuit denied the petition for panel rehearing and then, in an Amended Order, denied the petition for panel rehearing ***and*** rehearing *en banc*. *See* App. 41. The Second Circuit subsequently granted Petitioner's Motion to Stay the Mandate pending the filing of the instant Petition for Writ of Certiorari. App. 49-51. The improper conversion by the Second Circuit of the pending appeal of the District Court's grant of habeas relief to Mr. Walters had dire consequences. If the Second Circuit had correctly treated the case as an appeal of a habeas decision, rather than improperly converting it into a petition for review, then there would have been no issue as to transferring the case to the Eleventh Circuit. Jurisdiction and venue over the habeas appeal clearly would have remained in the Second Circuit, where the case would have been expeditiously decided.

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit below *eviscerates* without prior Congressional approval one of the fundamental tenets of American jurisprudence: the right to habeas review. The Second Circuit, by converting the *government's* pending habeas appeal into a Petition for Review, and by transferring the case to the Eleventh Circuit, acted contrary to the Real ID Act, Pub.L. No. 109-13, Div. B., 119 Stat. 231, 310-11 (enacted May 11, 2005). The Circuit Courts of Appeals

now provide judicial review over final orders of deportation and removal by the filing of a "petition for review." 8 U.S.C. § 1252. However, the Real ID Act does *not* withdraw habeas review where: (1) the alien won his case before the District Court; (2) an appeal was taken by the government, and not the alien; and (3) the habeas *appeal* was pending in the Circuit Court of Appeals, not the District Court, at the time of the enactment of the Real ID Act, on May 11, 2005.

A writ of certiorari should be granted to resolve the proper statutory construction of an important federal statute, in this case the Real ID Act. An issue of statutory construction, especially concerning a federal statute, is one of national importance and properly to be resolved by the Supreme Court. *See, e.g., Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987) ("because [the] judgment [below] is plainly inconsistent with important doctrines of statutory construction, we grant the motion for leave to proceed in forma pauperis and the petition for certiorari and reverse."); *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 528 (1985) ("The square conflict on an important question of statutory construction prompted us to grant certiorari."); *McElroy v. U.S.*, 455 U.S. 642, 643 (1982) ("Because of a conflict among the Circuits on [the] issue of statutory construction, we granted certiorari."). Moreover, the Second Circuit's decision creates a split in the Circuit Courts which have held that the Real ID Act does not bar habeas review where there is no final order of deportation or removal. *See Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) *Madu v. U.S. Atty. Gen.*,

470 F.3d 1362, 1366 (11th Cir. 2006); *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005). Certiorari is warranted to correct this wholesale misinterpretation of the Real ID Act and to ensure uniformity among federal courts in this important matter. *See Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 464 (1962).

A. The *Plain Language* Of The Real ID Act, Section 106(c), Contradicts The Second Circuit's Interpretation That *Appeals* Of Habeas Corpus Decisions In Immigration Matters Have Been Abolished If The Appeal Was Pending In The Circuit Court On The Day Of Real ID's Enactment

First and foremost, a close reading of the Real ID Act demonstrates that the Second Circuit erred in construing the appeal of a habeas corpus decision as a petition for review, where *the case was no longer pending before the District Court at the time of enactment*. Pursuant to Section 106(c) of P.L. 109-13,

> [i]f an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, ***is pending in a district court on the date of the enactment of this division*** [May 11, 2005], then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the

> court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252 [subsec. (b)(2) of this section]), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). ***The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242***, except that subsection (b)(1) of such section [subsec. (b)(1) of this section] shall not apply.

Section 106(c), Pub.L. 109-13, Div. B, Title I, May 11, 2005, 119 Stat. 311 (emphasis added). As the above language makes clear, an alien's case under Section 2241 must have been "***pending*** in a district court on the date of the enactment" of the Real ID Act. *Id.* (emphasis added). In the case at hand, Mr. Walters' habeas petition had been decided by the District Judge on October 31, 2003, *see* App. 29, well before the enactment of Real ID on May 11, 2005. The case was therefore not pending in the District Court and the final order had, in fact, been vacated by the District Court. Had the case been pending in the District Court on May 11, 2005, then the correct result would have been, as mandated by Section 106(c), for the District Court to "transfer the case . . . to the court of appeals for the circuit in which a petition for review could have been properly filed. . . ." Since the case was not "pending" in the District Court, it was impermissible for the Second Circuit to

convert the *appeal, without any statutory authority*, into a petition for review and then transfer it to another Circuit. The result was to impermissibly abolish the writ of habeas corpus.

Where language of a statute is clear on its face, inquiry into Congressional intent is not required. *INS v. Phinpathya*, 464 U.S. 183, 195-96 (1984). In the present case, the plain language of Section 106(c) mandates "transfer" of an alien's habeas case under 28 U.S.C. § 2241 if the case was "pending" in the District Court as of May 11, 2005. The plain language is clear and unequivocal in that it patently does not provide for such "transfer" of the case or consideration of the case as a "petition for review" where the case is no longer pending in the District Court.

While Section 106(a) of the Real ID Act generally[1] eliminated habeas corpus review over final orders of removal, it is essential to note that Congress also stated in 106(a) that such review is eliminated "[e]xcept as otherwise provided ***in this section***." Section 106(a), Pub.L. 109-13, Div. B, Title I, May 11, 2005, 119 Stat. 311 (stating that "[e]xcept as otherwise

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[1] Habeas review of course is preserved under the Real ID Act concerning matters other than review of final orders of removal, such as detention. *See* 28 U.S.C. § 2241; Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 109-72 at 175, 151 Cong. Rec. H2836, 2873 (May 3, 2005) (regarding preservation of habeas to review bond); *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005) (Remanding habeas detention challenge by Mariel Cuban back to district court because habeas may be brought post-Real ID Act when it is a challenge to detention).

provided in this section, no court shall have jurisdiction, by habeas corpus under Section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.") (emphasis added). Therefore, by the statute's own express language, and as "otherwise provided" in Section 106(c), habeas review is ***not*** eliminated ***unless*** the case was "pending" in the District Court at the time of enactment.

B. The Second Circuit's Decision Impermissibly and Unconstitutionally Removes Habeas Review Over Appeals Pending As Of The Date Of The Real ID Act's Enactment, In The Absence Of Any Congressional Intent For Such A Result And In The Absence Of Any Statutory Authority

There is a strong presumption in favor of judicial review. *See INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *Felker v. Turpin*, 518 U.S. 651, 652 (1996); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868); *Accord*, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Lindahl v. Office of Personnel Mangement*, 470 U.S. 768 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

In *St. Cyr*, this Court reaffirmed the long-standing rule that "[i]mplications from statutory text or legislative history are *not sufficient to repeal habeas jurisdiction*; instead, Congress must *articulate specific and unambiguous statutory directives* to effect a repeal." *Id.* at 299 (emphasis added) (citing, *Ex Parte Yerger,* 75 U.S. (8 Wall.) 85, 105 (1868), ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act")). Applying the well-settled principle that Congress' repeal of habeas jurisdiction must be "specific and unambiguous," this Court held that the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) did not apply retroactively in the absence of clear evidence of Congressional intent. *Id.* at 314-15; *see also Felker v. Turpin*, 518 U.S. 651, 652 (1996), relying on *Ex Parte Yerger,* 75 U.S. (8 Wall.) at 105 (1868), and interpreting another court stripping provision of AEDPA, finding that where Congress had not explicitly repealed habeas corpus jurisdiction that such jurisdiction could not be repealed "by implication.").[2] The unbroken mandate from this Court that

[2] This Court also has reaffirmed the supremacy of habeas corpus in the review of immigration detention decisions. *See Demore v. Kim*, 538 U.S. 510, 518, 123 S.Ct. 1708, 1714 (2003) ("Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his

(Continued on following page)

Congress must specifically and unambiguously articulate its intent before habeas review may be abrogated has remained consistent through over 137 years of American jurisprudence. *See Ex Parte Yerger*, 75 U.S. (8 Wall.) at 105 (1868) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law").

In the present case, there is absolutely no specific and unambiguous statutory language to support the proposition that a completed habeas decision is abolished on appeal in a Circuit Court and may be converted into a petition for review. In fact, the lack of statutory authority in the Real ID Act has been duly recognized by the lower courts. In *Bonhometre v. Gonzales*, 414 F.3d 442 (3d Cir. 2005), the Third Circuit expressly noted that the Real ID Act "was silent as to what was to be done with an appeal from a district court habeas decision that is now pending before a court of appeals. . . ." 414 F.3d at 446.

Moreover, habeas review is *fundamental* to our United States Constitution and may not be abrogated or limited without a specific showing of Congressional intent. *See Bounds v. Smith*, 430 U.S. 817, 827-28 (1977) (Habeas corpus and civil rights actions directly protect most valued rights and are of fundamental

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detention without bail"), and in *Zadvydas v. Davis*, 533 U.S. 678, 687-88, 121 S.Ct. 2491, 2497-98 (2001) ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

importance in the constitutional scheme); *Harris v. Nelson*, 394 U.S. 286, 291-92 (1969) (Writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action). In *INS v. St. Cyr, supra*, for example, the Supreme Court held that "*implications*" from the "statutory text or legislative history" are ***not*** sufficient to repeal habeas jurisdiction. Instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. *Id.* at 298-99 (citing and quoting *Ex Parte Yerger*, 8 Wall. 85, 102, 19 L.Ed. 332 (1869)). As the Court further stated in *St. Cyr*, "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.*

As the Petitioner has maintained throughout, the Real ID Act does not apply in the instant case. The rules of statutory construction, including the plain meaning rule, mandate that Congress must be presumed to mean what it says in the statutory text and must be presumed not to use any superfluous language. *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). Congress is also presumed to be familiar with the background of existing law when it legislates. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Duvall v. Attorney General of the United States*, 436 F.3d 382, 387 (3d Cir. 2006). As such, the Real ID Act's silence as to whether or not it applies to habeas cases decided by the District Court and on appeal in the Circuit Court at the time of enactment must be presumed to mean that the Act shall *not* apply in

such cases. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419 (1995) (reading of statute that accords presumption favoring judicial review would be adopted); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (holding that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review of administrative action), *superseded on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980 (1977).[3]

In *Moreno-Bravo v. Gonzales*, 463 F.3d 253 (2d Cir. 2006), the Second Circuit converted an appeal of a habeas decision, following its decision in *Gittens v. Menifee*, 428 F.3d 382 (2d Cir. 2005), in which a panel of the Court of Appeals held that "'those habeas petitions that were pending before the Court on the effective date of the [R]eal ID Act are 'properly

[3] This Court's decision in *Abbott Labs. v. Gardner*, *supra*, is instructive. In *Abbott Labs.*, this Court considered whether judicial review of a final agency decision of the Food and Drug Administration (FDA) should be cut off without clear and convincing evidence of Congressional intent. *Id.* at 139. The specific issue was whether the Food, Drug and Cosmetic Act "intended to forbid pre-enforcement review of [an FDA] regulation." *Id.* at 139-40. The Court found that judicial review under the Administrative Procedure Act (APA) could not be extinguished, and held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 140-41. The same rationale should be applied here to hold that there is no clear and convincing evidence that Congress intended, in passing the Real ID Act, that habeas review be repealed when the habeas decision had already been completed at the time of enactment.

converted to petitions for review and retained by this [C]ourt.'" *Id.* at 257 (quoting *Gittens*, 428 F.3d at 385) (quoting *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005)); *see also Gonzales-Gomez v. Achim*, 441 F.3d 532, 533 (7th Cir. 2006); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005).

However, *Gittens* (and *Moreno-Bravo*) and this entire line of cases from other Circuits have been incorrectly decided. In fact, there was no habeas petition "pending" before the Court of Appeals on the date of enactment, but instead an *appeal* of a habeas decision rendered *prior to* the enactment of the Real ID Act. *See Bonhometre*, 414 F.3d at 446; *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 n.3 (9th Cir. 2005) (reserving judgment with respect to whether habeas appeals may be converted into petitions for review under the Real ID Act, "where the pending habeas petition requires further factual development," and noting that, in such cases, "construing a pending habeas petition as a petition for review might bar this court from remanding the petition for further fact-finding.").

The question regarding the proper statutory construction of a federal statute, in this case the Real ID Act, specifically concerning jurisdiction to hear a pending habeas appeal has not been, and should be, settled by this Court. Issues of statutory construction, especially those concerning a federal statute, is one of national importance and properly to be resolved by the Supreme Court of the United States. *See, e.g.*,

Rodriguez v. U.S., 480 U.S. 522, 526 (1987); *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 528 (1985); *McElroy v. U.S.*, 455 U.S. 642, 643 (1982).

1. The Circuit Courts of Appeals Which Have Addressed This Issue, As Well As The Second Circuit Below, Have Misconstrued The Real ID Act, In Conflict With Decisions Of This Court

The Second Circuit is not alone in misconstruing the Real ID Act. There is a growing trend in the Circuit Courts to similarly misinterpret the Real ID Act to apply it to pending appeals of already completed habeas decisions of the United States District Courts. *See, e.g., Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005); *see also* discussion, *infra*, Part C. The existence of this trend, which is in direct conflict with Supreme Court precedents requiring clear and convincing evidence of Congressional intent before habeas review may be extinguished, presents a further reason for the granting of a writ of certiorari in the instant case. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted on claimed "conflict in principle"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 733, 764 (1985) ("appeared to conflict in principle").

C. The Second Circuit's Decision Below Creates A Circuit Split With Other Circuits Which Have Held That The Real ID Act Does *Not* Apply To Cases In Which There Is No Final Order Of Deportation, As In The Present Case

In a series of cases, the Circuit Courts of Appeals have found that the Real ID Act does *not* apply in cases where there is no final order of removal, such as in the present the case. *See Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (Section 106(c) of the Real ID Act, which requires the district court to transfer to the court of appeals habeas cases challenging final orders of removal, deportation, or exclusion, does not apply because petitioners do not challenge or seek review of any removal order); *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1366 (11th Cir. 2006) (holding that the Real ID Act required that habeas petitions "challenging [] final administrative order[s] of removal" that were pending before a district court on the effective date of the Act be transferred to the appropriate court of appeals, and converted to petitions for review, but also noting that a petitioner who contests the very existence of an order of removal does not seek "review of an order of removal" within the meaning of the Real ID Act); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2005); *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005).[4]

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[4] In *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2005), the Ninth Circuit held that the provision repealing habeas

(Continued on following page)

The *Ali-Madu-Nadarajah-Hernandez* line of cases correctly interprets the Real ID Act in a way which avoids the Constitutional issue and, more importantly, avoids the drastic step of curtailing, or

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review in the Real ID Act applied only to federal habeas corpus actions *over "final orders of removal."* *Id.* at 1075-76 (emphasis added). In *Nadarajah*, a Sri Lankan national had filed a habeas petition after being detained for five years by Immigration and Customs Enforcement, and after twice being *granted* relief by the Immigration Judge and Board of Immigration Appeals. *Id.* at 1074-75. The Ninth Circuit granted the habeas petition and found that its jurisdiction over the habeas appeal stemmed from the fact that "there [was] no final order of removal." *Id.* at 1076. In *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005), the First Circuit reached a similar conclusion. In that case, the petitioner filed a habeas case in the District Court challenging his continued detention. *Id.* at 42. When the alien was released from custody, the government moved to dismiss the habeas petition as moot. *Id.* Without ruling on the habeas petition *or* motion to dismiss, the District Court just transferred the case to the First Circuit under section 106(c) of the Real ID Act. *Id.* The First Circuit, in turn, held that the jurisdiction-stripping provisions of the Act, INA § 242(a)(5); 8 U.S.C. § 1252(a)(5), did not apply because the petition challenged the alien's detention *and* because there was no final order of removal, and remanded the case back to the District Court. *Id.* at 42-43 (citing cases reaching same result, *Sissoko v. Rocha*, 412 F.3d 1021, 1033 (9th Cir. 2005), *op. withdrawn and superseded on denial of reh'g* by 440 F.3d 1145 (9th Cir. 2006); *Ahmad v. Chertoff*, 2005 WL 1799752, at *1-*2 (W.D. Wash. July 27, 2005); *Kanteh v. Ridge*, 2005 WL 1719217, at *1, *3 (D. Minn. June 30, 2005), report and recommendation adopted, 2005 WL 1705526 (D. Minn. July 19, 2005); *Cretu v. Chertoff*, 2005 WL 1630541, at *1 (W.D. La. June 29, 2005); *Garcia-Perez v. United States Dep't of Homeland Sec.*, 2005 WL 1398100, at *1 (W.D. Tex. June 13, 2005); *Morena v. Gonzales*, 2005 WL 1367414, at *2 & n.2 (M.D. Pa. June 6, 2005)).

as in this case, completely abrogating the writ of habeas corpus. As stated in *St. Cyr*, "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' *see Crowell v. Benson*, 285 U.S. 22 [] (1932), [the courts] are obligated to construe the statute to avoid such problems." *INS v. St. Cyr,* 533 U.S. 289, 299-300, 121 S.Ct. 2271, 2278 (2001). Moreover, the legislature in formulating a statute is presumed not to use any superfluous language. *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). These rules apply in the present case. The Real ID Act must not be construed broadly to vacate all habeas corpus decisions merely because an appeal therefrom was pending in a Court of Appeals on the date of enactment.

The Second Circuit's decision below, as well as in *Moreno-Bravo,* and the Third Circuit's decision in *Bonhometre v. Gonzales*, *supra*, presents a Circuit split with those cases from the First, Ninth, and Eleventh Circuits, holding that the Real ID Act does *not* apply in cases where there is no final order of removal, such as in the present the case. *Moreno-Bravo*, and similar decisions, incorrectly have interpreted the Real ID Act to abolish habeas review even if no final order of removal exists.

It is important to emphasize that *there is no final order of removal* in Mr. Walters' case because at the time of the passage of the Real ID Act, on May 11, 2005, the District Court below had already *granted* Mr. Walters' habeas petition, vacating the final order

of removal. App. 30-31 (District Court decision filed November 6, 2003). The District Court found that due process had been violated and *reinstated* the Board of Immigration Appeals' original decision affirming the grant of relief by the Immigration Judge under former section 212(c) of the Immigration and Nationality Act. *See* App. 28.

D. The Second Circuit Further Erred By Transferring Mr. Walters' Case To Another Circuit And By Failing to Follow this Court's Case Law Mandating The Weighing Of "Traditional Venue Considerations" Before A Case Is Transferred

The Second Circuit's September 20, 2006 decision, App. 1-6, not only contravenes the Real ID Act and decisions of other Courts of Appeals, but is contrary to this Court's precedents concerning "traditional venue considerations," which must be considered before transfer of venue. Even assuming *arguendo* that the government's appeal of a habeas decision can properly be converted into a petition for review, the Second Circuit still was authorized to review the claims raised by Mr. Walters. Instead of exercising this authority, however, the Second Circuit converted the habeas appeal into a petition for review and then, *simultaneously*, transferred venue to the Eleventh Circuit using criteria in conflict with this Court's precedents. In so doing, the Court endorsed the government's position that the instant appeal

must be transferred under INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

It is not in dispute that the section relied upon, Section 1252(b)(2), is a *venue* provision only which provides as follows: "*Venue and forms.* The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. . . ." *Id.*; *see Nwaokolo v. INS*, 314 F.3d 303, 306, n.2 (7th Cir. 2002) (holding that INA § 242(b)(2) is "clearly a venue provision," as opposed to a jurisdictional provision and, thus, transfer of the petition for review to the Eighth Circuit where the IJ completed proceedings in that case was not warranted).

Pursuant to this Court's precedents, the traditional venue considerations which must be considered when deciding whether to transfer venue *in a habeas case* include: (1) where all of the material events occurred; (2) where the records and witnesses pertinent to the claim are likely to be found; (3) the convenience of the forum to the respondent and petitioner; and (4) the familiarity of the court with the applicable laws. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493, 500 (1973); *see also In re Stillwater Min. Co. Securities Litigation*, 2003 WL 21087953, at *3 (S.D.N.Y. May 12, 2003); *So*

v. Reno, 251 F. Supp.2d 1112, 1126-27 (E.D.N.Y. 2003).[5]

In *Braden*, this Court reversed the denial by the Court of Appeals of habeas relief based upon jurisdictional grounds. 410 U.S. at 485-87. The District Court in Kentucky granted habeas relief to the petitioner who was imprisoned in Alabama. *Id.* at 485. He had applied for habeas relief to permit him to receive a speedy trial on an indictment returned by the grand jury in Kentucky. *Id.* This Court reversed the denial of the habeas petition, reasoning *inter alia* that in terms of traditional venue considerations, "the District Court for the Western District of Kentucky is almost surely the most desirable forum for the

[5] The requirement that certain factors must be balanced before change of venue may be ordered is not of course limited to the context of adjudicating habeas petitions. In other contexts, there are also very clearly delineated rules which mandate that the adjudicator balance certain factors. In the immigration context, by analogy, an immigration judge may change venue for "good cause," under 8 C.F.R. § 1003.20(b), which is determined by balancing such factors as "administrative convenience, the alien's residence, the location of witnesses, evidence and counsel, expeditious treatment of the case, and the cost of transporting witnesses and evidence to a new location." *Monter v. Gonzales*, 430 F.3d 546, 559 (2d Cir. 2005) (citing *Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995)). In the federal court context, applying 8 U.S.C. § 1404(a), the Supreme Court has made clear that the District Courts are required "to weigh in the balance a number of case-specific factors," including the existence of a forum-selection clause, the convenience of the parties and witnesses, and the interests of justice. *Stewart Organization v. Rico Corp.*, 487 U.S. 22, 29-30 (1988).

adjudication of the claim." *Id.* at 493. Just as in the present case, all the material events took place in that forum, the records and witnesses pertinent to petitioner's claim were likely to be found there, and that forum was "presumably no less convenient for the respondent and the Commonwealth of Kentucky, than for the petitioner." *Id.* at 493-94; *see also Rasul v. Bush*, 542 U.S. 466, 495 (2004) (citing *Braden* and re-affirming that prior Supreme Court case law does not provide "an inflexible jurisdictional rule dictating the choice of an inconvenient forum even in a class of cases *which could not have been foreseen at the time of that decision*") (internal quotation marks omitted).

As is apparent from the September 20, 2006 decision of the Second Circuit, *see* App. 1-6, the Court below did *not* apply the traditional venue considerations as required by this Court in *Braden*. The only factor considered by the Second Circuit related to whether "manifest justice" would occur in transferring Mr. Walters' petition. App. 5. The Court of Appeals found there would be no manifest injustice because Mr. Walters was not incarcerated and furthermore that the case was not a "sure loser." *Id.* The summary order below violates *Braden* and the other cases from this Court because the Second Circuit failed to apply the traditional venue factors before transferring the case to the Eleventh Circuit.

In addition, had the Second Circuit applied those venue factors in the present case, it would have found that venue properly belonged in the Second Circuit because the primary order subject to review was the

deportation order completed and rendered in that Circuit, that is, New York, and therefore subject to review under INA § 242(b)(2). Although the government asserted that the Eleventh Circuit was the appropriate court because the second removal order arose in Florida, it offers no explanation why the second order, which was subsidiary to, and dependent upon, the New York order, should govern the place of review. As the district court understood in focusing its attention on the New York order, a decision in favor of the petitioner in the first order would render the second, Florida order moot. It is also important to emphasize that procedurally if Mr. Walters' lawful permanent resident status is revived by virtue of a decision in the Second Circuit, then the Florida proceeding cannot stand as it was premised upon Mr. Walters re-entering the United States as a non-resident, without INA § 212(c) relief, and with a valid final order of deportation.[6]

In Mr. Walters' case, the traditional venue considerations mandated by this Court clearly weighed in favor of retaining his petition. *See Braden*, 410 U.S. at 493-94. Virtually all of the material events occurred within the Second Circuit, and that is where

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[6] Given that the District Court has already ruled on the habeas petition and briefing was completed in the Second Circuit, principles of judicial economy and finality militated against transferring the instant appeal to the Eleventh Circuit in the interests of justice. *See, e.g., Bonhometre*, 414 F.3d at 446, n.5 (applying the "manifest injustice" standard).

the records and witnesses remain. New York was the site of his criminal conviction and original deportation proceedings from 1993 to 1995. If Mr. Walters were ultimately removable, it would be solely because of his New York conviction and incarceration. In fact, as noted, the Immigration Court proceedings in Florida clearly were ancillary to those of the New York proceedings, and the Florida Immigration Judge found no new independent grounds of removability. That any immigration proceedings arose in Florida was the accidental result of Mr. Walters' detention in that State following a business trip.

Moreover, Mr. Walters has resided in New York at all times during these proceedings. *See Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995) (stating that one factor is "the alien's residence"). New York is thus the far more convenient forum for him, while the government can litigate this matter equally well in Florida or New York. Furthermore, there is no material difference between the Second Circuit and the Eleventh Circuit regarding their familiarity with applicable law. In addition, interpretation of New York law is central to his appeal, including whether or not he was incarcerated for five years under New York law. As such, this Court should grant certiorari for the further reason that the Second Circuit failed to apply traditional venue consideration, as required, which would have mandated retaining jurisdiction over this case.

In sum, certiorari should be granted in this case for the following reasons: (1) to decide an important

question of national importance concerning the proper interpretation and application of a federal statute, the Real ID Act; (2) to bring the decisions of the Circuit Courts of Appeal on this issue in line with the rulings of this Court; and (3) to re-affirm the strong presumption of judicial review and the central importance of habeas jurisdiction to our Constitutional scheme.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street; in the City of New York, on the 20th day of September, two thousand six.

PRESENT:

HON. THOMAS J. MESKILL,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges,

RICKY MARTIN LLOYD WALTERS,

Petitioner-Appellee,

v.

JOHN ASHCROFT, Attorney General of the United States; IMMIGRATION AND NATURALIZATION SERVICE; EDWARD J. MCELROY, Assistant District Director,

Respondents-Appellantss [sic].

SUMMARY ORDER

No.04-0099-pr
(Filed Sep. 20, 2006)

Appearing for Appellant:	MICHAEL R. HOLDEN, Assistant United States Attorney (Kathy S. Marks, Assistant United States Attorney, of counsel; David N. Kelley, United States Attorney for the Southern District of New York, on the brief), New York, NY
Appearing for Appellee:	IRA J. KURZBAN, Kurzban, Kurzban, Weinger & Tetzeli, P.A. (Alex Solomiany, on the brief), Miami, FL.

Appeal from the the [sic] United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of

the District Court is **VACATED,** and that the petition is converted into a petition for review and **TRANSFERRED** to the Eleventh Circuit.

The Government appeals from the order of the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*) granting Walters's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Walters's habeas petition challenged a final order of removal entered against him by the Board of Immigration Appeals ("BIA") in November 2002.

While this appeal was pending, the REAL ID Act of 2005, Pub. l. no. 109-13, Div. B, 119 Stat. 231 (May 11, 2005) ("Act") came into effect. Section 106(a) of the Act eliminates the habeas jurisdiction of the district courts over claims challenging final removal orders, and provides that petitions for review filed with the Courts of Appeal shall be the exclusive means for challenging final removal orders. By its express terms, the Act is retroactive and applies to cases "in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after" the date of enactment. *See id.* at § 106(b). Section 106(c) provides that habeas petitions pending before a district court on the date of enactment be transferred to the court of appeals "in which a petition for review could have been properly filed," and treated as a petition for review. *See id.* at § 106(c).

Although the statute does not expressly provide for the disposition of habeas petitions that were pending on appeal on the date of enactment, it is now well-established that we must vacate the District Court's opinion and order, and convert this appeal into a petition for review under 8 U.S.C. § 1252. *See Gittens v. Menifee*, 428 F.3d 382 (2nd Cir. 2005) (per curiam); *Moreno-Bravo v. Gonzales*, No. 03-2968, ___ F.3d ___, 2006 WL 2615254 (2d Cir. Sept. 12, 2006).

The Government argues that, in cases such as this where the petition for review could not, had it initially been filed as a petition for review, have properly been filed in this court, we lack jurisdiction to hear the converted petition; the Government argues that we are compelled, as a jurisdictional matter, to transfer such petitions to the court of appeals in which the petition could have been brought as a petition for review of a final order of removal. In Walters's case, because his removal proceedings were completed by an immigration judge in Florida, that would be the Eleventh Circuit, *see* 8 U.S.C. § 1252(b)(2), and the Government urges us to transfer the petition there.

In *Moreno-Bravo*, we determined that § 1252(b)(2) is not a jurisdictional provision, but merely a venue provision. *See Moreno-Bravo*, ___ F.3d ___, 2006 WL 2615254 at *9. We therefore have discretion, in an appropriate case, to retain a petition such as Walters'. *See id.* However, under the circumstances of this case, we do not think it appropriate to do so.

In *Moreno-Bravo*, we retained the converted petition for two principal reasons. First, because the case had been fully briefed and argued before us, and because "Moreno-Bravo, having been in the custody of the Bureau of Immigration and Customs Enforcement since March 2001, ha[d] waited over three and a half years for a federal court to adjudicate his claims," we concluded that it would be a "manifest injustice" to delay the resolution of his case, *id.* at ___, 2006 WL 2615254 at *9; and second, because it would be "futil[e]" to "waste the time of another court by transferring" the petition, given the "utter meritlessness" of Moreno-Bravo's claims. *Id.*

Walters, unlike Moreno-Bravo, is not presently in custody. Moreover, the Government stipulated at oral argument that Walters will not be returned to custody while his petition is pending before the Eleventh Circuit, notwithstanding our vacation of the District Court's order granting him habeas relief. We thus see no manifest injustice in transferring his petition. In addition, while we take no position on the ultimate merit of Walters' claim, it is clearly far from a "sure loser," *id* (quoting *Phillips v. Sieter*, 173 F.3d 609 (7th Cir. 1997)). Indeed, Walters prevailed in the District Court. While he may not ultimately prevail on his petition for review, it is clearly not futile to transfer the petition to the circuit in which it properly belongs.

For the foregoing reasons, we vacate the District Court's opinion and order, we convert Walters's

habeas petition into a petition for review, and we transfer it to the Eleventh Circuit.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

/s/ Lucille Carr

BY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICKY MARTIN LLOYD WALTERS,

Petitioner,

-against-

JOHN ASHCROFT, Attorney General of the United States, et al.

Respondents.

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02-CIV-9577 (KMW)
OPINION & ORDER

(Filed Nov. 3, 2003)

WOOD, U.S.D.J.:

Ricky Martin Lloyd Walters ("Petitioner") seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, to vacate a final order of deportation entered by the Board of Immigration Appeals ("BIA") on March 26, 1997, and to reinstate a November 7, 1995 order of the BIA granting Petitioner relief from deportation under former section 212(c) of the Immigration and Nationality Act ("INA") (8 U.S.C. § 1182(c)) (repealed 1996).[1] Petitioner raises constitutional and statutory challenges to the March 26, 1997 BIA decision, which (1) granted a motion to reconsider filed by the INS,

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[1] Although INA § 212(c) was repealed by Congress in 1996, the Supreme Court has held that § 212(c) remains available to aliens who, like Petitioner, pled guilty to aggravated felonies prior to September 30, 1996. *See INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

(2) vacated the November 7, 1995 BIA decision, and (3) ordered Petitioner deported. Respondents argue that the Court lacks personal jurisdiction over all Respondents, and that the petition is meritless. For the reasons set forth below, the Court finds that it has personal jurisdiction over Respondent John Ashcroft, and that Petitioner was denied due process by the BIA's March 26, 1997 order granting the INS' motion to reconsider and vacating the BIA's prior decision without proper authority. Petitioner's application for a writ of habeas corpus is granted.

I. Background

Petitioner is a citizen of the United Kingdom.[2] He was admitted to the United States as a lawful permanent resident ("LPR") on April 16, 1976. On March 22, 1991, in the Supreme Court of the State of New York, Petitioner pled guilty to, and was convicted of, two counts of attempted murder in the second degree and eight counts involving firearms violations. Petitioner was sentenced to an indeterminate term of imprisonment with a maximum term of ten years imprisonment and a minimum term of three and one-third years imprisonment. On November 29, 1993, the Immigration and Naturalization Service ("INS")

[2] Any fact noted without specific citation is undisputed and has been drawn from Petitioner's Petition for Writ of Habeas Corpus and Incorporated Memorandum of Law, filed December 2, 2003, and Respondents' Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, filed March 12, 2003.

issued an Order to Show Cause and Notice of Hearing, charging Petitioner with deportability for having been convicted of a firearms offense, INA § 241(a)(2)(C), and an aggravated felony (crime of violence), INA § 241(a)(2)(A)(iii). Petitioner's removal hearing took place in New York before Immigration Judge Alan Vomacka ("IJ") on five dates between March 1 and June 19, 1995.

Petitioner contested deportability before the IJ, but was found deportable on the basis of having been convicted of (1) at least one firearms offense, and (2) an aggravated felony. *See* June 19, 1995 Oral Decision of the Immigration Judge ("IJ Decision") at 3 (Return at 142). Petitioner applied for two forms of discretionary relief from deportation: a waiver pursuant to § 212(c) and a waiver pursuant to § 212(h). In order to be statutorily eligible for § 212(c) relief, an alien must demonstrate that he (1) is a lawful permanent resident of the United States, (2) has maintained an unrelinquished domicile in the United States of seven consecutive years, and (3) has not served a term of five years in prison. On June 19, 1995, the IJ found Petitioner eligible for,[4] and deserving of, relief

[3] Although § 212(c) was drafted as a waiver of grounds of excludability for a returning alien, courts have consistently interpreted it to apply equally to those who have not yet departed from the country and are charged with deportable offenses. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 J. & N. Dec. 26, 30 (BIA 1976).

[4] At that point, it is undisputed that Petitioner had not yet served five years in prison.

under INA § 212(c), and identified "unusual and outstanding equities . . . " in Petitioner's case. *See* IJ Decision at 28 (Return at 167).[5] The IJ granted Petitioner a waiver of excludability along with adjustment of status, allowing Petitioner to retain his status as a lawful permanent resident until such time as a final order of deportation was entered against him. The INS filed a timely appeal of the IJ's decision, and argued to the BIA that the IJ erred in finding Petitioner deserving of discretionary relief under § 212(c). The INS did not at that time argue that Petitioner was not eligible for relief, because it remained undisputed that Petitioner had been eligible at the time that the IJ made his decision. Sometime after the parties submitted briefing to the BIA, and certainly by the time the BIA ruled on the INS

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[5] The IJ also found Petitioner eligible for, and deserving of, relief under INA § 212(h). *See* IJ Decision at 30 (Return at 169). The Court notes that Petitioner is no longer eligible for relief under the current version of § 212(h), which bars LPRs convicted of aggravated felonies from obtaining such relief. 8 U.S.C. § 1182(h). This restriction became law as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which had an effective date of September 30, 1996. Although Petitioner applied for § 212(h) relief prior to the effective date of IIRIRA, Petitioner's removal proceedings were ongoing until March 26, 1997, Petitioner is therefore subject to the limitations placed on § 212(h) relief by IIRIRA. *Matter of Yeung*, 21 I. & N. Dec. 610, 613-14 (BIA 1997) (holding that the restrictions on § 212(h) eligibility enacted in IIRIRA apply retroactively to LPRs who were still in removal proceedings at the time of the effective date of IIRIRA.

appeal, Petitioner had served five years in prison.[6] Addressing the sole question before it on appeal (that is, the question of whether Petitioner was deserving of § 212(c) relief), the BIA dismissed the INS appeal on November 7, 1995, finding that "the granting of section 212(c) relief appears to be in the best interest of the country." *See* November 7, 1995 BIA Decision at 9 (Return at 60).

On December 8, 1995, the INS filed with the BIA a Motion to Reopen Deportation Proceedings and to Reconsider. The INS argued in the motion that the BIA "should have denied the respondent's request for §212(c) relief because he was not statutorily eligible for §212(c) relief by the date of the Board's decision in that he had served a term of imprisonment of at least 5 years." *See* Government's Motion to Reopen Deportation Proceedings and to Reconsider, ("INS Motion to Reconsider") at ¶ 8 (Return at 41). In support of this argument, the INS attached a letter that INS Trial Attorney Suzanne McGregor received on October 23, 1995. *Id.* at ¶ 6 (Return at 41-42). The letter was sent by John R. O'Keefe, Superintendent of Gouverneur Correctional Facility in Gouverneur, New York, and stated, *inter alia*: "We are in receipt of your request dated October 13, 1995 regarding the above-noted

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[6] Whether Petitioner's time in prison stopped counting for purposes of his 212(c) eligibility is one question before the Court. But it is not disputed as a factual matter that Petitioner had been physically in prison for five years by the time the BIA ruled on November 7, 1995.

individual who is presently in our custody." *See* Letter to INS Trial Attorney Suzanne McGregor, dated October 19, 1995 (Return at 43). Superintendent O'Keefe informed Ms. McGregor that as of the date of his letter, October 19, 1995, Petitioner had served 5 years, 14 days in prison. *Id.* Although it was received two weeks before the BIA ruled, the government concedes that it did not present this evidence of Petitioner's time spent in prison to the BIA's attention prior to the November 7 ruling.

On March 26, 1997, the BIA issued a decision granting the INS Motion to Reconsider and vacating the BIA's November 7, 1995 decision. The BIA held that "as of October 19, 1995, the respondent had served a total of 5 years, 14 days in prison, and therefore was ineligible for a section 212(c) waiver." *See* March 26, 1997 BIA. Decision (Return at 6).[7]

On April 25, 1997, Petitioner filed, in the United States Court of Appeals for the Second Circuit, a petition for review of the March 26, 1997 BIA decision. On June 12, 1998, the Second Circuit dismissed the petition for lack of jurisdiction, finding that "[b]ecause Walters was found deportable based on aggravated felony and firearms convictions," the court was barred from reviewing his final order of removal. *Walters v. INS,* 159 F.3d 1349 (table), 1998

[7] As discussed above, the BIA also found the Petitioner ineligible for § 212(h) relief, an issue it had chosen not to reach in its November 7, 1995 decision. *See* November 7, 1995 BIA Decision at 10 (Return at 61).

WL 537197 (2d Cir. June 12, 1998) (unpublished). It appears that sometime thereafter, Petitioner departed the country.

On June 1, 2002, INS officers in Bradenton, Florida detained Petitioner when he attempted to reenter the country. The INS again served Petitioner with an Order to Show Cause and Notice to Appear, charging him with being inadmissibile for (1) his prior crimes, and (2) his post-removal re-entry. On July 12, 2002, an IJ in Florida found Petitioner inadmissible on both grounds and ineligible for any form of relief, and ordered that he be removed to the United Kingdom. Petitioner appealed the IJ's decision to the BIA. Before the BIA ruled on that appeal, Petitioner filed a petition for habeas corpus in the Middle District of Florida on August 13, 2002. This petition was denied on September 10, 2002 because the Petitioner had not yet exhausted his administrative remedies.[8] On November 25, 2002, the BIA summarily affirmed the IJ's decision. On December 3, 2002, Petitioner filed a petition for review in the United States Court of Appeals for the Eleventh

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[8] The district court's decision is somewhat confusing, in that it appears to construe Petitioner's claim as one challenging the lawfulness of his continued detention, rather than the lawfulness of his original order of deportation. *See* Petitioner's Response to Respondents' Memorandum of Law in Opposition to Petition for Habeas Corpus ("Petitioner's Response"), filed March 11, 2003, Exhibit A at 2-3 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

Circuit. The Eleventh Circuit dismissed the petition for lack of jurisdiction on January 30, 2003.

The instant petition and motion for a stay of removal were filed with this Court on December 2, 2002. On December 27, 2002, this Court granted a stay of removal. The Court now addresses the merits of the petition.

II. Personal Jurisdiction

The Court must decide, as a threshold matter, whether it has personal jurisdiction over the Respondents. 28 U.S.C. § 2443 states that "the writ . . . shall be directed to the person having custody of the person detained." The government argues that the only proper respondent in this case is the INS Miami District Director, due to the fact that the Petitioner is currently detained in Bradenton, Florida, where his most recent removal hearings were held. Because this Court would apparently not have personal jurisdiction over the Miami District Director, the Respondents argue that the petition must be dismissed. Petitioner argues, however, that Attorney General John Ashcroft is a proper respondent in a habeas petition brought by an alien challenging a final order of removal.

The Court notes that the Supreme Court and the Second Circuit have both reserved judgment on this

precise question.[9] *See Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (stating "we do not reach the question whether the Attorney General is the proper respondent); *Henderson v. INS*, 157 F.3d 106, 130 (2d Cir. 1998) ("We decline at this time to resolve the issue of whether the Attorney General is a proper respondent for habeas actions brought by aliens facing deportation."). The circuit courts that have addressed this issue have split. Two circuits have held that although courts should generally apply the "immediate custodian" rule and assert habeas jurisdiction only over the person who exercises "day-to-day control" over the detainee, "extraordinary circumstances" may justify exceptions to the immediate custodian rule. *See Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (suggesting that extraordinary circumstances might include a situation in which the location of the detainee is undisclosed, or where the INS has "spirited an alien from one site to another in an attempt to manipulate jurisdiction."); *Roman v. Ashcroft*, 340

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[9] The Government cites *Pedreiro v. Shaughnessy*, 213 F.2d 768 (2d Cir. 1954), for the proposition that the INS District Director is the only proper respondent in a habeas petition. However, *Pedreiro* simply holds that the Attorney General is not an indispensable party for purposes of a motion to dismiss for failure to name an *indispensable* party. *See Pedreiro*, 213 F.2d at 770. The case says nothing about whether the Attorney General may be a *proper* respondent. In fact, although the Second Circuit holds that the Attorney General is not an indispensable party, the court goes on to say that since aliens may be moved outside of the jurisdiction of District Directors, the injunctive relief available in the case might not be "as comprehensive as it could be if the Attorney General had been joined." *Id.*

F.3d 314, 325-26 (6th Cir. 2003) (same). However, the Ninth Circuit recently held that strictly adhering to the immediate custodian rule "does not make sense in the immigration context[,]" and that "the most appropriate respondent to petitions brought by immigration detainees is the individual in charge of the national government agency under whose auspices the alien is detained." *Armentero v. INS*, 340 F.3d 1058, 1071 (9th Cir. 2003).

The courts of the Southern District of New York and the Eastern District of New York are similarly divided with respect to this issue. *Compare Torres-Nevas v. Ashcroft*, No. 02CV1745, 2003 WL 21143067, at *2 (E.D.N.Y. Apr. 27, 2003) (Johnson, J.) (Attorney General is proper respondent); *Small v. Ashcroft*, 209 F. Supp. 2d 294, 296 (S.D.N.Y. 2002) (Rakoff, J.) (same); *Cinquemani v. Ashcroft*, No. 00-CV-1460, 2001 WL 939664, at *3 (E.D.N.Y. Aug. 16, 2001) (Dearie, J.) (same); *Arias-Agramonte v. Commissioner of INS*, No. 00 CIV. 2412, 2000 WL 1617999, at *4-9 (S.D.N.Y. Oct. 30, 2000) (Sweet, J.) (same); *Alcaide-Zelaya v. McElroy*, Nos. 99Civ.5102, 99Civ.9999, 2000 WL 1616981, at *3-5 (S.D.N.Y. Oct. 27, 2000) (Chin., J.) (same); *Pena-Rosario v. Reno*, 83 F.Supp.2d 349, 362 (E.D.N.Y. 2000) (Gleeson, J.) (same); *Pottinger v. Reno*, 51 F. Supp. 2d 349, 357 (E.D.N.Y. 1999) (Weinstein, J.) (same); *Nwankwo v. Reno*, 828 F. Supp. 171, 176 (E.D.N.Y. 1993) (Korman, J.) (same) *with Belvett v. Ashcroft*, No. 00 Civ. 2463, 2002 WL 287839, at *1 (S.D.N.Y. Feb. 27, 2002) (McKenna, J.) (Attorney General is not a proper respondent); *Guerrero-Musla v.*

Reno, No. 98 Civ. 2779, 1998 WL 273038, at *2 (S.D.N.Y. May 28, 1998) (Baer, J.) (same); *Wang v. Reno*, 862 F. Supp. 801, 812-13 (E.D.N.Y. 1994) (Sifton, J.) (same); *Peon v. Thornburgh*, 765 F. Supp. 155, 156 (S.D.N.Y. 1991) (Stanton, J.) (same).

The question of whether a court has personal jurisdiction over the Attorney General, when the Attorney General is named in § 2241 petitions, comes down to whether the Attorney General is a custodian for these purposes. This question concerns the relationship between the Attorney General and the aliens over whose circumstances the Attorney General has been delegated virtually total control. *See Henderson*, 157 F.3d at 125-26. The Court is persuaded that the Attorney General is a custodian of all aliens seeking review of final orders of removal, given the need for a flexible, practical approach to determining the proper custodian for habeas petitions, *see id.* at 124, and the "unique role" that the Attorney General plays in matters involving aliens. *Id.* at 125-26 (reviewing the many powers granted to the Attorney General with respect to aliens including, but not limited to, the authority to detain and produce aliens, to order aliens deported, to grant or deny discretionary relief from deportation, and to temporarily parole aliens into the country for humanitarian or other reasons). Indeed, the Attorney General is designated by statute to be the proper respondent in petitions for review brought by aliens challenging their orders of deportation, *see* 8 U.S.C. § 1252(b)(3)(A), and commonly concedes personal jurisdiction in habeas petitions such as this one.

See Henderson, 157 F.3d at 126 n.21.[10] The Court is guided by the reasoning of two decisions in particular, *Alcaide-Zelaya v. McElroy* and *Arias-Agramonte v. Commissioner of INS*.

In adopting this reasoning, the Court rejects the approach taken by those courts that find the Attorney General to be the appropriate custodian only where there exist "extraordinary circumstances." Adoption of that test would sow confusion in habeas cases, and serves no practical purpose. No rationale has been offered for holding that the Attorney General's custodial relationship with aliens challenging final orders of removal hinges upon such facts as how often an alien is transferred from one detention center to another, or whether there are so many aliens seeking habeas corpus relief in one district that habeas review is no longer available within a reasonable amount of time. *See Nwankwo v. Reno*, 828 F. Supp. 171, 174 (E.D.N.Y. 1993) (referring to the immense backlog in habeas petitions found in the Western District of Louisiana, which prevents the Western

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[10] *See also* Rachel E. Rosenblum, *Is the Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the "Immediate Custodian" Rule in Immigration-Related Habeas Actions*, 27 N.Y.U. Rev. L. & Soc. Change 543, 577 (2002) (noting that when petitioners who name the Attorney General as a respondent file their 2241 petitions in the district of confinement, thereby neutralizing concerns about the proper forum, the government has not challenged the court's jurisdiction over the Attorney General).

District of Louisiana from handling habeas petitions filed by detained aliens in a timely manner).

The Court also concludes that the proper venue for this petition is the Southern District of New York. Traditional principles of venue apply in habeas petitions. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 500 (1973). The three factors to be considered in determining venue are (1) "where all the material events took place"; (2) where "the records and witnesses pertinent to petitioner's claim are likely to be found"; and (3) the relative convenience of the forum for the parties. *Henderson*, 157 F.3d at 127 n. 25 (*quoting Braden*, 410 U.S. at 493-94). In the present case, the crimes for which Petitioner was ordered deported were committed in New York, and he served his sentence in New York. Petitioner's first set of deportation proceedings were conducted here, including the proceeding in which the IJ decided to grant Petitioner a § 212(c) waiver and adjustment of status. Following his incarceration, Petitioner was paroled by the New York Department of Corrections, and reported to a parole officer in the Southern District of New York. *See* Petitioner's Response at 4. Although Petitioner is presently detained in Florida, the nature of his challenge to the most recent order of removal is based on the propriety of his original order of removal. Given Petitioner's choice of forum, and the fact that Respondents never claim, or plausibly could claim, that New York is an inconvenient location for the Attorney General, the

Court finds venue in the Southern District of New York to be appropriate.[11]

III. Subject Matter Jurisdiction

Habeas corpus jurisdiction, pursuant to 28 U.S.C. § 2241, extends to final orders of deportation, despite the substantial changes in immigration law enacted in 1996. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (holding that "habeas jurisdiction under § 2241 was not repealed by [the Antiterrorism and Effective Death Penalty Act of 1996] and IIRIRA."); *Jean-Baptiste v. Reno*, 144 F.3d 212, 220 (2d Cir. 1998) (same).

Section 2241 grants courts power over prisoners "in custody to violation of the Constitution or laws or treaties of the United States. . . ." The scope of review does not extend to "review of discretionary determinations by the IJ and the BIA." *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001). Insofar as Petitioner asks the Court to decide whether the BIA abused its decision when it granted the INS' Motion to Reconsider, this

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[11] The Court agrees with the Second Circuit that strict application of the venue doctrine should suffice to constrain any forum shopping on the part of aliens who choose to name the Attorney General. *See Henderson*, 157 F.3d 127-28. Absent recognition of the Attorney General as a proper respondent, however, the government could determine the forum by directing that the alien be detained in a particular facility. *See Alcaide-Zelaya*, 2000 WL 1616981, at *5 ("It is, after all, the government that directs where an alien is detained.").

Court has no jurisdiction to consider such a claim. *See* 8 C.F.R. § 3.2(a) (1997) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board. . . . "). This Court retains jurisdiction over only "purely legal statutory and constitutional claims." *See Sol*, 274 F.3d at 651 (citing *Calcano-Martinez v. INS*, 232 F.3d 328, 342 (2d Cir. 2000), aff'd 533 U.S. 348 (2001)).

IV. Discussion

Petitioner raises two cognizable claims for habeas corpus relief. First, Petitioner argues that the BIA, in granting the motion to reconsider based upon "new evidence" that he was statutorily ineligible, denied him due process. Second, Petitioner argues that § 212(c)'s five year incarceration bar to eligibility for 212(c) applies only where the Petitioner has served five years in prison by the time the IJ determines eligibility.

It is well-settled that "the liberty of an individual is at stake" when the government seeks to deport an alien. *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). *See Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.Ct. 492, 66 L.Ed. 938 (1922) (deportation can strip one "of all that makes life worth living."). Because of this, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *See Reno v. Flores*, 507 U.S. 292, 307, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (*citing The Japanese Immigrant Case*, 189 U.S. 86, 100-01, 23

S.Ct. 611, 46 L.Ed. 721 (1903)). Aliens are entitled to a "full and fair hearing" that accords with the principles of due process. *See Michel v. INS*, 206 F.3d 253, 259 (2d Cir. 2000); *Bridges*, 326 U.S. at 154 ("Meticulous care must be exercised lest the procedures by which [an alien] is deprived of that liberty not meet the essential standards of fairness.").

Petitioner argues that his right to procedural due process was violated when the BIA granted the INS Motion to Reconsider on March 26, 1997. Petitioner argues that the BIA cannot grant a motion to *reconsider* based on "new" evidence, particularly when that same evidence was in the hands of the INS Trial Attorney two weeks before the original BIA decision and would therefore not even be proper grounds for a motion to reopen. In this case, the claimed "new" evidence was a letter that was received by the INS Trial Attorney two weeks before the November 7, 1995 BIA ruling; the letter informed the INS that the Petitioner had spent 5 years, 14 days in prison as of October 19, 1995. The BIA accepted the "new" evidence without having given Petitioner an opportunity to argue its inadmissibility, and then moved on to what it assumed to be the only outstanding issue – the issue of whether the time spent in prison is ever tolled for purposes of determining eligibility for 212(c) relief; the BIA asked the parties to brief that issue. *See* BIA Letter Requesting Briefing, dated February 14, 1996 (Return at 37-38). Petitioner argues that when the BIA considered the "new" evidence in ordering briefing on the five year issue, this resulted

in a fundamentally unfair hearing on the INS Motion to Reconsider in that it afforded the INS a second bite at the apple, denied Petitioner finality, and provided him with no meaningful opportunity to respond.[12]

Petitioner's argument has merit. Although the March 26, 1997 BIA decision does not refer specifically to the Letter included in the INS Motion to Reconsider, there is no question that the BIA decision relies entirely upon the information contained in the letter. *Compare* March 26, 1997 BIA decision (stating "as of October 19, 1995, the respondent had served a total of 5 years, 14 days in prison, and therefore was ineligible for a section 212(c) waiver.") *with* INS Motion to Reconsider (stating that as of October 19, 1995, the "Total Time Served" was "5 years, 14 days"). There is no reason to believe that, had the BIA not considered that evidence, the BIA would have changed its original decision, particularly because it had just found, in agreement with the IJ, that the granting of relief was "in the best interest of the country." *See* November 7, 1995 BIA Decision at 9 (Return at 60).

Although it is true that the BIA has discretion over whether or not to grant a motion to reconsider,

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[12] Alternatively, Petitioner may be understood as arguing that the failure of the INS to present the letter to the BIA before the November 7, 1995 ruling denied the Petitioner a fair hearing before the BIA initially. This argument would be without merit because the Petitioner had a full and fair hearing before the BIA and was, in fact, granted § 212(c) relief on November 7, 1995.

that discretion is "subject to the restrictions" set forth in regulations. 8 C.F.R. § 3.2(a). A motion to reconsider can be based only on "errors of fact or law in the prior Board decision." 8 C.F.R. § 3.2(b)(1). The BIA cannot consider new facts through a motion to reconsider; upon a motion to reconsider, the factual record is the original record at the time the original decision was rendered. *See Zhao v. US DOJ*, 265 F.3d 83, 91 (2d Cir. 2001) ("a motion for reconsideration asks the Board to reevaluate its decision on the existing factual record") (citing *Matter of Cerna*, 20 I. & N. Dec. 399, 402 (BIA 1991)); *Iturribarria v. INS*, 321 F.3d 889, 895 (9th Cir. 2003) ("It is implicit in [the regulation governing motions to reconsider] that the BIA will reconsider the party's case using the same record evidence used in making its prior decision.").

The Court finds that the BIA's consideration of the "new" evidence contained in the letter, which the INS had failed to offer in a timely fashion, violated the restrictions placed by regulation on the BIA's authority to grant motions to reconsider. Just as an alien must present his case in full before the BIA for its review, the INS must be expected to do so. *See Matter of Guerva*, 20 I. & N. Dec. 238, 249 (BIA 1991) (denying an INS motion to reconsider based on new evidence, because the INS consciously chose not to offer the new evidence when it first became available). The BIA is not permitted to admit new evidence in connection with a motion to reconsider. When the INS fails present all available evidence to the BIA for inclusion in the record on review, the BIA must abide

by regulations and disregard new evidence from being considered in a motion to reconsider.

Respondents argue that because briefing was complete before the INS received the letter, the INS followed the proper course in presenting the letter through a motion to reconsider. Respondents are incorrect. A motion to reconsider can never be the appropriate course for introducing new evidence into the record. The only vehicle for introducing *new* evidence post-decision is a motion to reopen. *See* 8 C.F.R. § 3.2(c)(1). To admit new evidence through a motion to reopen, the BIA must be satisfied that the "new facts" were "unavailable or could not have been discovered or presented at the former hearing." *Id.* The INS concedes that the letter was available to the INS Trial Attorney two weeks before the original decision. The fact that briefing was complete at the time the INS obtained the letter does not render the letter "unavailable" to the INS at the time of the original BIA decision. The INS had the option of sending the letter to the BIA to be added to the record.[13] Had it done so, the BIA could have added the

[13] Although it is true that aliens bear the burden of demonstrating eligibility for discretionary relief, the INS did not challenge Petitioner's eligibility on appeal, and therefore conceded eligibility at the time the BIA considered the matter on November 7, 1995. When the INS learned on October 23, 1995, that Petitioner's eligibility was now an appropriate issue for the BIA to consider, the burden was on the INS, not the Petitioner, to notify the BIA that it wishes to contest Petitioner's eligibility. The government has never explained why it did not seek to supplement the record when it first received the letter.

(Continued on following page)

letter to the record and either decided the case itself on the basis of the facts then before it, *see Matter of S-H-*, 23 I. & N. Dec. 462, 463-64 (BIA 2002), or the BIA could have treated the INS submission as a motion to reopen/remand to the IJ and directed the IJ to reconsider Petitioner's eligibility. *See* 8 C.F.R. § 3.2(c)(4).

It would be fundamentally unfair for either party to be able to add new facts to the record on a motion to reconsider, especially when those facts were available to the INS prior to the original BIA decision, and would not therefore even be admissible through a motion to reopen. Because the BIA supplemented the record in violation of 8 C.F.R. § 3.2(b)(1), and in violation of fundamental fairness, the Court holds that Petitioner was denied a hearing on the Motion to Reconsider that comported with due process and the principles of fundamental fairness.

It is unclear whether Petitioner must show prejudice in order to prevail. In the immigration context, the Second Circuit requires a showing of prejudice in ineffective assistance of counsel claims founded in the Fifth Amendment Due Process Clause, *see Iavorski v. US INS*, 232 F.3d 124, 128-29 (2d Cir. 2000), as well as in collateral challenges to a deportation order presented in a criminal action, *see United*

Furthermore, the Court notes that absent evidence to the contrary, the BIA could not have assumed that Petitioner had served five years in prison by the time of its original decision.

States v. Fernandez-Antonia, 278 F.3d 150, 157 (2d Cir. 2002). However, when a regulation that implicates important constitutional or statutory rights is violated, prejudice need not be shown. *See Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (holding that prejudice need be shown only when the regulation in question does not implicate fundamental rights). *See also Chong v. District Director, INS*, 264 F.3d 378, 389-91 (3d Cir. 2001) (applying *Waldron* prejudice test to an alien's petition for habeas corpus); *Kasperek v. Ashcroft*, No. 02 Civ. C302, 2002 WL 31869383, at *2 (S.D.N.Y. Dec. 23, 2002) (same). In this case, where the violation of the regulation implicates fundamental due process rights, the Court holds that prejudice need not be demonstrated.[14]

However, the Court finds, in the alternative, that the Petitioner has demonstrated such prejudice. In the context of a collateral challenge to a deportation

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[14] The court in *Waldron* expressed a concern that requiring remand in every situation where the INS violated a regulation would place "an unwarranted and potentially unworkable burden on the agency's adjudication of immigration cases." *See Waldron*, 17 F.3d at 518. It was for this reason that the court required a showing of prejudice only when the violation of the regulation did not implicate a fundamental right. In this case, because the violation in question involves the decision of the BIA to wrongfully vacate its earlier decision, no "unwarranted and unworkable burden" need be placed on the BIA through remand in any case. Petitioner's case had already been fully heard by the BIA; but for the wrongful grant of the INS Motion to Reconsider, the BIA's November 7, 1995 decision would have become final. Because of this, the Court finds that it need not remand the case to the BIA for any additional proceedings.

order in a criminal case, "[i]n order to show prejudice, [an alien] must show that, absent the procedural errors, he would not have been removed." *U.S. v. Fernandez-Antonia*, 278 F.3d 150, 159 (2d Cir. 2002). On the basis of the March 26, 1997 BIA decision itself granting the motion to reconsider and vacating its November 7, 1995 decision, there can be little question that but for the BIA's procedural error in reopening the record, the Petitioner would not have been ordered removed.

Because the Court finds that Petitioner was denied due process when the BIA granted the INS Motion to Reconsider and vacated its original decision, the Court finds that the original BIA decision should be reinstated and Petitioner's second claim need not be decided.

V. Conclusion

For the reasons set forth above, the Court hereby grants the petition for writ of habeas corpus. In the interests of finality, and because the BIA has already fully considered, and granted, Petitioner's application for § 212(c) relief and adjustment of status in its November 7, 1995 ruling, the Court hereby vacates the March 26, 1997 BIA ruling and reinstates the BIA's earlier ruling.

SO ORDERED

Dated: New York, New York
October 31, 2003

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICKY MARTIN LLOYD WALTERS,

Petitioner,

-against-

JOHN ASHCROFT, Attorney General of the United States, et al.,

Respondents.

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02 **CIVIL** 9577
(KMW)
JUDGMENT

(Filed Nov. 6, 2003)

A petition for habeas corpus pursuant to U.S.C. § 2241 having been submitted to the Honorable Kimba M. Wood, United States District Judge, and the Court, on October 31, 2003, having rendered its Opinion (89277) and Order granting the petition for writ of habeas corpus, and in the interest of finality, and because the BIA has already fully considered, and granted, Petitioner's application for §212(c) relief and adjustment of status in its November 7, 1995 ruling, the Court vacates the March 26, 1997 BIA ruling and reinstates the BIA's earlier ruling, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (89277) and Order dated October 31, 2003, the petition for writ of habeas corpus is granted, and in the interest of finality, and because the BIA has already fully considered, and granted, Petitioner's application for §212(c) relief and adjustment of status in its

November 7, 1995 ruling, the Court vacates the March 26, 1997 BIA ruling and reinstates the BIA's earlier ruling.

DATED: New York, New York
November 6, 2003

J. MICHAEL McMAHON
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A36-184-775-Bradenton Date: Nov. 25, 2002

In Re: WALTERS, RICKY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Solomiany, Alex

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/ Lauri S. Filppu
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Bradenton, Florida

File A 36 184 775 July 12, 2002

In the Matter of

RICKY WALTERS,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE: Section 212(a)(2)(A)(i)(1) in the Act, as admitted an alien whose been convicted of or who admits having committing any or commits acts which constitutes (indiscernible) crime involving moral turpitude and other (indiscernible) political offense and 212(a)(9)(A)(i)(2) of the Act, as an alien who has been ordered removed under Section 240 of the Act or any other provision of law who already departed the United States while such an order of removal was outstanding or who seeks admission within 10 years of the date of departure or removal.

APPLICATION: Motion to terminate, motion to reopen, adjustment of status and a waiver of 212(h).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Alex Solomiany, Esquire 80 Southwest 8th Street, Suite 2157 Miami, Florida 33130	Mr. James Grim, Esquire INS Trial Attorney Bradenton, Florida

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 37-year-old male, native and citizen of the United Kingdom. He was charged pursuant to the Notice to Appear, Exhibit number 1, with arriving at the door of the United States at a port of Miami on the cruise ship, Explorer of the Seas on the 1st day of June 2002. And at that stage of the game, he was stopped and put in secondary inspection and, the records indicated that the respondent had been convicted and on 6/6 1991 for criminal possession of a firearm and attempted murder. And furthermore, an order of removal of deportation had been issued against the respondent in 1999. And so, that's barring him 10 years from renewing in the United States.

The respondent appeared at a hearing conducted on the 12th day of July of the year 2002, admitted allegations 1, 2 and 3. Denied allegations 3 and 5 in the charges of removability.

The following evidence was submitted in evidence, Exhibit number 1, is the Notice to Appear. Exhibit number 2, is an I-213. Exhibit number 3, is a I-94.

Exhibit number 4, is a judgment conviction. Exhibit number 5, is a warrant of deportation. Exhibit number 6, is a sworn statement taken from the respondent upon arrival.

The evidence indicated to the admissions that the respondent was not a citizen or national of the United States but a native of the United Kingdom and citizen of United Kingdom. See the Notice to Appear and the I-213 and Exhibit number 6. Also, that he was arriving at June 1, the year 2002, coming from Haiti on the cruise ship the Explorer of the Seas and at Miami port of entry and that the Immigration Service stopped him. (See Exhibit number 3, and Exhibit number 6, and the I-213, Exhibit number 2). The evidence indicated that the respondent had been convicted as pointed out in Exhibit number 4. (See Exhibit number 4 and also the I-213). And that he had been previously ordered removed and deported. (See the I-213 and Exhibit number 6, and Exhibit number 5). And the Court concluded that removability had been established by evidence which is clear and convincing.

Respondent had asked that the motion to terminate the proceedings or a motion to reopen a Board of Immigration Appeals decision earlier be set aside. And that decision was dated 26 March '97, signed by Judge Paul Schmidt in which the Service motion to reconsider was granted. The decision of 7 November '95 was vacated and the Service appealed and the Immigration Judge's decision sustained and

the respondent was ordered removed and deported to the United Kingdom.

However, this Court does not have authority to reopen a Superior Court or an Appellate Court decisions nor, I just don't have that authority to do that, so I must deny the motion to terminate and the motion to reopen.

The respondent also asked for, to adjust status and proceed under the waiver, however, in the old exclusion proceedings warrant a case of arriving alien, the Immigration Judge is without authority to handle adjustment of status cases and the only one that could be with the appropriate authority would be the District Director. The only exception is when an alien is properly allowed to depart the United States with a specific parole or a specific document, advance parole, that would allow him to leave and depart for that specific purpose.

Okay, so, in reviewing all the evidence, I do not see that the respondent is eligible for any type of relief. I must deny the motion to reopen, the motion to terminate, and adjustment of status of waiver. And order that under 212(h) noted that the respondent be removed and deported from this country to his native country the United Kingdom.

R. KEVIN MCHUGH
Immigration Judge

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A36 184 775 – Fishkill Date: Mar. 26, 1997

In Re: RICKY MARTIN LLOYD WALTERS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Maggy Duteau, Esquire
377 Broadway, Suite 801
New York, New York 10013

ORDER:

PER CURIAM. The Immigration and Naturalization Service has filed a motion asking that we reconsider our November 7, 1995, decision dismissing its appeal from an Immigration Judge's decision granting relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The motion is based on the fact that as of October 19, 1995, the respondent had served a total of 5 years, 14 days in prison, and therefore was ineligible for a section 212(c) waiver. *See Matter of A-A-*, Interim Decision 3176 (BIA 1992). The Service is correct that at the time we rendered our decision on November 7, 1995, the respondent was not eligible for section 212(c) relief.

Moreover, the respondent is now statutorily ineligible for section 212(c) relief as an "alien who is

deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense are covered by section 241(a)(2)(A)(ii) for which both predicate offenses covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 1040-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

We have noted that the Immigration Judge also granted the respondent's application for relief under section 212(h) of the Act, and the Service appealed from this decision as well. We did not find it necessary to address this issue in our prior decision in this case. In view of today's disposition of the Service's motion on Section 212(c) relief, we must address the 212(h) issue. Due to the respondent's conviction of an aggravated felony, the respondent is also ineligible for a section 212(h) waiver. *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

For the foregoing reasons, the Service motion to reconsider is granted, our decision of November 7, 1995, is vacated, and the Service appeal from the Immigration Judge's decision is sustained.

FURTHER ORDER: The respondent is ordered deported to the United Kingdom.

/s/ Paul W Schmidt
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	04-0099-pr
Short title:	Walters v. Ashcroft
DC Docket Number:	02-cv-9577
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Kimba Wood

(Filed May 11, 2007)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of May two thousand seven.

Present:

Hon. Thomas J. Meskill

Hon. Chester J. Straub

Hon. Robert A. Katzman

CIRCUIT JUDGES,

Ricky Martin Lloyd Walters,

Petitioner-Appellee,

v.

John Ashcroft, Attorney General of the United States; Immigration & Naturalization Service; Edward J McElroy, Assistant District Director,

Respondent-Appellant

A petition for panel rehearing having been filed herein by Ricky Walters

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	04-0099-pr
Short title:	Walters v. Ashcroft
DC Docket Number:	02-cv-9577
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Kimba Wood

(Filed May 24, 2007)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of May two thousand seven.

AMENDED ORDER

Ricky Martin Lloyd Walters,

Petitioner-Appellee,

v.

John Ashcroft, Attorney General of the United States; Immigration & Naturalization Service; Edward J McElroy, Assistant District Director,

Respondent-Appellant

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Ricky Walters. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Ann M. Heller
Motion Staff Attorney

(Cite as: 119 Stat 231)

UNITED STATES PUBLIC LAWS
109th Congress – First Session
Convening January 7, 2005

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Additions and Deletions are
not identified in this database.
Vetoed provisions within tabular
material are not displayed
PL 109-13 (HR 1268)
May 11, 2005

EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT FOR DEFENSE, THE GLOBAL WAR ON TERROR, AND TSUNAMI RELIEF, 2005

An Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

DIVISION B – REAL ID Act of 2005

* * *

SEC. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) IN GENERAL. – Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended –

(1) in subsection (a) –

* * *

(A) in paragraph (2) –

(i) in subparagraph (A), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "Notwithstanding any other provision of law";

(ii) in each of subparagraphs (B) and (C), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D)" after "Notwithstanding any other provision of law"; and

(iii) by adding at the end the following:

* * *

"(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS. – Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon

a petition for review filed with an appropriate court of appeals in accordance with this section."; and

* * *

(B) by adding at the end the following:

* * *

"(4) CLAIMS UNDER THE UNITED NATIONS CONVENTION. – Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

"(5) EXCLUSIVE MEANS OF REVIEW. – Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms

'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, *311 sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

* * *

(2) in subsection (b)(9), by adding at the end the following: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact."; and

(3) in subsection (g), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law".

* * *

8 USCA § 1252 NOTE

(b) EFFECTIVE DATE. – The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) TRANSFER OF CASES. – If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a feral administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.

(d) TRANSITIONAL RULE CASES. – A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be

the sole and exclusive means for judicial review of an order of deportation or exclusion.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square
49 Center Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 04-0099-pr

Motion for: STAY OF MANDATE

Set forth below precise, complete statement of relief sought:

Motion to stay mandate pending filing of Petition for a Writ of Certiorari in U.S. Supreme Court

MOVING PARTY: Ricky Walters

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☒ Appellee/Respondent

MOVING ATTORNEY: Ira J. Kurzban
[name of attorney, with firm, address, phone number and e-mail]

KURZBAN KURZBAN WEINGER & TETZELI

2650 SW 27 Ave, #200

MIAMI FL 33133 (505) 444-0060

ira@kkwtlaw.com

Court-Judge/Agency appealed from: U.S. District Court for S.D.N.Y (Judge Wood)

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☐ Yes ☑ No

B. been obtained? ☐ Yes ☑ No

Is oral argument requested? ☑ Yes ☐ No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No

If yes, enter date Argument was held already

Signature of Moving Attorney:

/s/ Ira J. Kurzban Date: 5/30/2007

Caption [use short title]

Ricky Martin Lloyd Walters

v.

John Ashcroft, et al.

(Filed May 31, 2007)

OPPOSING PARTY: John Ashcroft, et al., Appellant

OPPOSING ATTORNEY [Name]: Michael R. Holden

[name of attorney, with firm, address, phone number and e-mail]

Assistant U.S. Attorney

US Attorneys Office S.D.N.Y

86 Chambers Street

N.Y. NY 10007

(212) 637-2804

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this Court?

☐ Yes ☐ No

Requested return date and explanation of emergency:

Has service been effected? ☑ Yes ☐ No

[Attach proof of service]

ORDER

Before: Hon. Thomas J. Meskill, Hon. Chester J. Straub, Hon. Robert A. Katzmann, *Circuit Judges*

IT IS HEREBY ORDERED that the motion to stay the mandate pending filing of Petition for Writ of Certiorari is GRANTED.

(Stamped Jun. 8, 2007)
Date

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by

/s/ Tracy W. Young
Tracy W. Young
Motions Staff Attorney